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No. 10-668

Supreme Court, U.S.
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In the Supreme Court of the United States

MARY ROBYN PRIESTER,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101 *et seq.*, or Federal Motor Vehicle Safety Standard 205, 49 C.F.R. § 571.205, preempts a state law tort claim that a vehicle was defective because it utilized tempered glass in its side windows rather than another form of glazing.

RULE 29.6 STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Pet. App. 1-13) is reported at 697 S.E.2d 567. The order of the trial court (Pet. App. 14-34) is not reported.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on August 2, 2010, and a timely petition for rehearing was denied on September 2, 2010. The petition for a writ of certiorari was filed on November 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

This case concerns the preemptive effect of the federal safety requirements for the "glazing materials," or types of glass surfaces, used in vehicle windshields and windows. The type of glazing material used can have important safety consequences. For example, tempered glass consists of a single sheet of specially treated glass. When broken, the entire piece of tempered glass shatters into many small pieces with dull edges. By contrast, laminated glass consists of two or more sheets of ordinary glass held together by an intervening layer of plastic material. Laminated glass will crack and break under sufficient impact, but the pieces of glass tend to adhere to the plastic. *See* Pet. App. 6. As the South Carolina Supreme Court observed, "it can be generally stated that tempered glass is safer for vehicle occupants wearing seatbelts, where the risk of ejection is reduced," whereas "[l]aminated glass is safer for unbelted passengers, where the risk of ejection is increased." *Id.*

Statutory And Regulatory Background

1. Under the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101 *et seq.* (Safety Act), Congress directed the Secretary of Transportation to establish federal motor vehicle safety standards (FMVSSs) that "shall be practicable, [and] meet the need for motor vehicle safety." 49 U.S.C. § 30111(a). The Secretary has delegated the responsibility to promulgate such FMVSSs to the Administrator of the National Highway Traffic Safety Administration (NHTSA). 49 C.F.R. § 1.50(a).

FMVSS 205 specifies the requirements for glazing materials in vehicles. 49 C.F.R. § 571.205 S1 (2001). Its "purpose ... is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions." *Id.* § 571.205 S2. FMVSS 205 deliberately provides vehicle manufacturers with the option to install side windows made either with tempered glass or so-called "advanced glazing" materials—a term used for laminated glass and certain glass-plastic materials—so long as the glass meets certain testing requirements. *Id.* § 571.205 S5.1.1.

FMVSS 205 states that manufacturers "shall conform" to the safety code developed by the American National Standards Institute and explicitly incorporates Standard Z26—"ANS Z26"—by reference. *Id.* § 571.205 S5.1.1. ANS Z26, in turn, provides manufacturers with the option of installing tempered glass or advanced glazing in side windows. In leaving manufacturers with that flexibility, ANS Z26 states, among other things, that "[o]ne safety

glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type," but that "no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions." ANS Z26 § 2.2. As NHTSA recognized, for example, the safety equation changes significantly depending on whether an occupant is wearing a seatbelt or not. *See infra*.

2. From 1988 to 2001, NHTSA evaluated whether to require manufacturers to use advanced glazing on side windows, primarily to protect against the ejection of unbelted occupants in crashes. *See generally* 67 Fed. Reg. 41,365 (June 18, 2002). In 2000, Congress directed NHTSA "to complete and issue a final report on advanced side glazing." H.R. Rep. No. 106-940, at 117 (2000) (Conf. Rep.), *reprinted in* 2000 U.S.C.C.A.N. 1063, 1108. In August 2001, after a more than a decade of studying the "cost and safety benefits" of advanced glazing, NHTSA issued a final report rejecting an advanced-glazing requirement. NHTSA, *Ejection Mitigation Using Advanced Glazing: Final Report* at x, 54 (Aug. 2001) (NHTSA Final Report). Less than a year later, NHTSA terminated the pending proposed "rulemaking on the issue of advanced glazing" due to "safety and cost concerns." 67 Fed. Reg. at 41,367.

Although NHTSA concluded that an advanced-glazing requirement would not offer any safety benefits that could not be achieved through other countermeasures preventing ejections, NHTSA determined that advanced side glazing *increased* the risk of neck injury for belted passengers. NHTSA Final Report at ix-x; 67 Fed. Reg. at 41,366-67. Consistent with its longstanding objective to promote seatbelt use, NHTSA explained in its 2001 report that

it was "extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide enhanced safety benefits primarily for unbelted occupants." NHTSA Final Report at x, 54.

In rejecting an advanced-glazing requirement, NHTSA also pointed to the "advent of other ejection systems, such as side air curtains," which it believed could offer similar protection against occupant ejection without exposing passengers to increased risk of neck injury. 67 Fed. Reg. at 41,367; NHTSA Final Report at x-ix. Given the safety and cost concerns that NHTSA identified with an advanced-glazing requirement, the agency determined that it would be "more appropriate" to focus on the development of ejection mitigation measures other than advanced glazing. 67 Fed. Reg. at 41,367; NHTSA Final Report at x. Indeed, along with the increased risk of injury that advanced glazing poses to belted occupants, NHTSA cited the need to focus on other ejection mitigation countermeasures in deciding to withdraw the pending rulemaking on an advanced-glazing requirement. 67 Fed. Reg. at 41,367.

Factual Background and Decisions Below

1. During the early morning hours of August 17, 2002, petitioner's son, James Lloyd Priester, was riding without a seatbelt in the rear seat of a 1997 Ford F-150 pickup truck that was speeding along a highway near St. George, South Carolina, when it reached a bend in the roadway. The driver failed to negotiate the turn and the truck traveled off the road into a ravine and rolled over several times. Both the driver of the vehicle and Priester were intoxicated at the time. Priester was ejected from the vehicle during the rollover and died at the scene. Pet. App. 3, 15.

Petitioner filed a state tort law action against Ford Motor Company (Ford), alleging that the tempered glass installed in the side window of the F-150 rendered the vehicle defective and unreasonably dangerous because it did not do more to prevent occupants from being ejected during rollover accidents (as petitioner alleged laminated glass would have done). Ford moved for summary judgment, arguing that petitioner's state tort suit was preempted by FMVSS 205, which, as discussed, embodies NHTSA's expert judgment in administering the Safety Act that requiring manufacturers to install only laminated glass or other forms of advanced glazing would undermine federal safety, cost, and related objectives.

The state trial court granted summary judgment for Ford. Pet. App. 14-34. It held that "Ford cannot be held liable for choosing tempered glass without contravening the federal regulatory scheme applicable to automobile design and safety under FMVSS 205, the Safety Act of 1966, and the Supremacy Clause." Pet. App. 18-19. Relying on this Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the trial court concluded that petitioner's action was impliedly preempted by FMVSS 205 because it would undermine the agency's "specific policy objectives" in adopting FMVSS 205. Pet. App. 21-22. Among other things, the court explained that "NHTSA preserved the tempered glass option because it might benefit individuals who use the safety equipment NHTSA requires, i.e., occupants who choose to use their seat belts," Pet. App. 33, and that the agency therefore determined that an advanced-glazing mandate was "the wrong course of action," Pet. App. 26.

2. The South Carolina Supreme Court affirmed.

Pet. App. 1-13. The court reviewed the history of FMVSS 205 and NHTSA's deliberate choice to allow the installation of laminated or tempered glass in side windows. The court emphasized that, in refusing to require advanced glazing, NHTSA explained that it was "'extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide safety benefits primarily for unbelted occupants.'" Pet. App. 7 (quoting 2001 NHTSA Report). The court concluded that "allow[ing] this suit to go forward would sanction a jury verdict finding the Ford-150 pickup truck to be defectively designed solely because it selected the federally authorized choice of tempered glass," and that "such a result would stand as an obstacle to achieving the purposes and objectives of [FMVSS] 205." Pet. App. 12.

DISCUSSION

1. Petitioner asks (Pet. 22-23) this Court to hold the petition and dispose of it in light of *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (argued November 3, 2010). In *Williamson*, the Court is considering whether the Safety Act or FMVSS 208, 49 C.F.R. § 571.208 (1987)—which explicitly gives manufacturers the option of installing either of two types of seatbelts in certain rear seating positions—preempts state tort law claims seeking to penalize manufacturers that installed one type of seatbelt instead of the other option. For the reasons explained by the respondents in *Williamson*, the California courts correctly determined that FMVSS 208 preempts the state tort action in *Williamson*. Nevertheless, whatever the outcome in *Williamson*, this case involves a different FMVSS adopted on the basis of a distinct regulatory record. The regulatory record in

this case strongly supports the South Carolina Supreme Court's decision holding that petitioner's action is preempted by FMVSS 205 and the Safety Act.

For example, as the South Carolina Supreme Court recognized, in refusing to adopt an advanced-glazing requirement, NHTSA specifically stated that it was "'extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide safety benefits primarily for unbelted occupants.'" Pet. App. 7 (quoting NHTSA Final Report); *see* 67 Fed. Reg. at 41,367 (recognizing "increase[d]" risk of injury posed by laminated glass). That "extreme[]" reluctance was supported by an express purpose of FMVSS 205—"to *reduce* injuries resulting from impact to glazing surfaces," 49 C.F.R. § 571.205 S2 (emphasis added)—as well as a core concern of the Safety Act and decades of NHTSA rulemaking—encouraging seatbelt use. *See Geier*, 529 U.S. at 875-81. A state law tort rule imposing an advanced-glazing requirement would directly conflict with the achievement of those federal policies.

In addition, in declining to adopt an advanced-glazing requirement, NHTSA specifically cited the "advent of other ejection mitigation systems, such as side air curtains," and determined that it was "more appropriate" to focus on the development of such other systems. 67 Fed. Reg. at 41,367. Thus, in addition to safety and cost concerns, the agency's rejection of an advanced-glazing requirement was based on a desire to foster the study and development of potentially more promising ejection mitigation systems. That objective is analogous to the agency's effort to encourage the development of other safety systems in rejecting an all-airbag rule in 1984. *See Geier*, 529 U.S. at 879.

Moreover, in *Williamson*, both the plaintiff and United States placed great emphasis on a sentence in the Federal Register stating that NHTSA "encourage[d]" manufacturers to install lap/shoulder belts in rear aisle seats—when feasible to do so without creating the particular safety concerns cited by the agency when rejecting a lap/shoulder belt requirement for such seats. 54 Fed. Reg. 46,257, 46,258 (Nov. 2, 1989); *see, e.g.*, No. 08-1314 Pet. Br. 11, 26, 37, 40, 44 (July 3, 2010); No. 08-1314 U.S. Br. 17, 18, 20, 21, 22, 28 (Aug. 6, 2010). As the respondents in *Williamson* explained, that sentence by no means eliminated the conflict presented by a state law tort rule imposing a lap/shoulder belt requirement. No. 08-1314 Resp. Br. 41-43 (Sept. 21, 2010). But in any event, there is no such statement in the regulatory record in this case.[1]

Accordingly, although Ford has no objection to holding the petition pending the decision in *Williamson* given the Court's customary hold practice, important aspects of the regulatory record underlying FMVSS 205 underscore that the decision below is the product of a proper application of this Court's precedents, including *Geier*, and does not warrant further review regardless of the outcome in *Williamson*. If the Court holds the petition for *Williamson*, Ford will address the Court's decision in *Williamson*, as appropriate, in a supplemental brief pursuant to Rule 15.8.

2. Although petitioner primarily asks this Court to

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[1] These differences, among others, presumably explain why the South Carolina Supreme Court denied petitioner's suggestion that it grant rehearing in light of this Court's grant of certiorari in *Williamson* and the brief filed by the Solicitor General in support of certiorari in *Williamson*, which petitioner specifically relied on in seeking rehearing and filed with the South Carolina court.

hold her petition and dispose of it in light of *Williamson*, she also briefly suggests that the Court should grant certiorari "irrespective of its handling of *Williamson*." Pet. 4. That contention should be rejected. Indeed, the disposition that would be appropriate "irrespective of ... *Williamson*" would be to deny the petition. The South Carolina courts carefully considered FMVSS 205 in light of the principles established by this Court's decisions—including *Geier*—and correctly concluded that this action is preempted by FMVSS 205 because a state tort law rule imposing an advanced-glazing requirement would actually conflict with FMVSS 205 and the federal policies and objectives that NHTSA sought to achieve in *rejecting* such a requirement.

Indeed, here, as in *Williamson*, the federal regulation at issue does more than simply set a federal floor. It specifically grants manufacturers the option of using one type of equipment or another. *See supra* at 2-3. A state law tort rule penalizing manufacturers for choosing one of the options directly authorized by federal statute or regulation conflicts with the federal rule, even if it is possible to comply with both by forgoing the federal option. *See, e.g.*, *Wyeth v. Levine*, 129 S. Ct. 1187, 1209 (2009) ("[I]f federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both by electing to refrain from the covered behavior.") (Thomas, J., concurring in judgment). A federal law granting a manufacturer a particular option is direct evidence that it would conflict with federal law to take that option away. At a minimum, however, where, as here (and in

Williamson), allowing the state tort action to proceed not only would extinguish an option specifically granted by federal law but also frustrate the express regulatory objectives on which that option is based, then the state law rule actually conflicts with federal law and is preempted. *See Geier*, 529 U.S. at 885-86.

Furthermore, petitioner has provided no persuasive reason for granting review in this case while *Williamson* is still pending before the Court. The Court therefore should reject petitioner's half-hearted request that the Court grant the petition outright.[2]

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[2] Other state appellate courts have reached the same conclusion as the South Carolina courts below and held that state tort actions like the instant one are preempted by FMVSS 205. *See, e.g., Morgan v. Ford Motor Co.*, 680 S.E.2d 77 (W. Va. 2009); *Lake v. Memphis Landsmen, LLC*, No. W2009-00526-COA-R3-CV, 2010 WL 891867 (Tenn. Ct. App. Mar. 15, 2010). *But see MCI Sales & Serv., Inc. v. Hinton*, N9. 09-0048, 2010 WL 5135330 (Tex. Dec. 17, 2010). Petitioner relies heavily on *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), the lone federal court of appeals case going the other way. Pet. 17. As the South Carolina trial court explained, however, *O'Hara* fails properly to account for the regulatory decisions embodied by FMVSS 205 and to give effect to conflict preemption principles. Pet. App. 23-33. In any event, because the decision below is correct and consistent with this Court's decisions, the asserted conflict with *O'Hara* does not provide a sufficient basis for further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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